ALTERNATE FUELS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-88 Decided July 21, 1988

Cross-appeals from a decision of Administrative Judge Michael L. Morehouse denying a petition for an award of costs and expenses. TU 5-23-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Bad Faith/Harassment

A permittee must show that OSMRE initiated an enforcement action against it in bad faith and for the purpose of harassing or embarrassing it in order to be awarded costs and expenses from OSMRE for participation in an administrative proceeding in accordance with sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), and 43 CFR 4.1294(c). Prevailing over OSMRE before the Hearings Division does not demonstrate the bad faith or improper purpose that are necessary for such an award.

2. Board of Land Appeals--Regulations: Binding on the Secretary--Regulations: Validity--Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Challenges to the validity of a national rule promulgated by the Secretary under the Surface Mining Control and Reclamation Act of 1977 may only be brought to the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. | 1276(a) (1982). The Board of Land Appeals does not have jurisdiction to rule on such a challenge. The Board is bound by a duly promulgated regulation of the Secretary and is not authorized to declare it invalid.

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Standards for Award

A determination that the amount petitioned for as an award of costs of expenses is reasonable will be set aside where it was not arrived at in accordance with
the proper fee computation standards.

APPEARANCES: Stephen C. Braverman, Esq., Philadelphia, Pennsylvania, and A. J. Wachter, Esq., Pittsburg, Kansas, for appellant; Gerald A. Thornton, Esq., Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Alternate Fuels, Inc., appeals the October 18, 1985, decision of Administrative Law Judge Michael L. Morehouse denying its petition for
an award of costs and expenses, including attorneys' fees, incurred as
a result of its participation in an administrative proceeding under the Surface Mining Control and Reclamation Act of 1977. See section 525(e) of the Act, 30 U.S.C. | 1275(e) (1982), and 43 CFR 4.1290-4.1296. The Office of Surface Mining Reclamation and Enforcement (OSMRE) has also appealed Judge Morehouse's decision; it objects to his finding that the amount of costs and expenses claimed was reasonable.

Alternate Fuels filed its petition with Judge Morehouse within 45 days of receipt of his July 15, 1985, decision granting its motion for summary decision 1/ and vacating a notice of violation issued it by OSMRE. 43 CFR 4.1291; see Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229, 233 (1988). It argued that it would be unjust not to award it the expenses incurred in defending a test case of OSMRE's authority to regulate it after the release of its bonds by the state regulatory authority. OSMRE opposed the petition on the grounds that Alternate Fuels had not alleged that OSMRE had initiated the enforcement action against it in bad faith and for the purpose of harassing or embarrassing it. See 43 CFR 4.1294(c). Alternate Fuels responded that nothing in section 525(e) requires a showing of bad faith, that the requirement in 43 CFR 4.1294(c) that a permittee demonstrate OSMRE's bad faith in order to be entitled to an award from OSMRE was not binding, and that it was entitled
to the award under the Board's decision in Donald St. Clair, 84 IBLA 236,
92 I.D. 1 (1985). Judge Morehouse held that his decision was governed by
43 CFR 4.1294(c), that he was bound by that regulation, and that "[s]ince applicant does not allege, and in fact does not claim bad faith or harassment, applicant's petition must be denied" (Decision at 5). He went on to state "[i]t is felt desirable to make a finding regarding the reasonableness of the amount of the petition for costs and expenses incurred in the amount of $20,825.21," and found they were reasonably incurred under 43 CFR 4.1295.

1/ See 43 CFR 4.1125.

On appeal Alternate Fuels argues that section 525(e) does not require a demonstration of bad faith by OSMRE as a condition of an award to a coal operator and that "[i]n promulgating 43 CFR 4.1294(c) the legislative history [of section 525(e)] was misread to impose the requirement that OSM act in bad faith as a condition for an award to an operator of costs and expenses" (Brief at 5). OSMRE admits that it saw the case as a test case of its authority and that the case raised novel and difficult issues of law, appellant observes. It points out that private corporations do not have to show bad faith on the part of the government for an award under the Clean Air Act, citing Florida Power & Light Co. v. Costle, 683 F.2d 941 (5th Cir. 1982), and that we have previously followed Clean Air Act precedents in determining the proper standard for an award under section 525(e), citing Donald St. Clair, supra. Finally, appellant argues that we are not bound to follow 43 CFR 4.1294(c), quoting Judge Burski's statement in Donald St. Clair, 84 IBLA at 259, 92 I.D. at 14 n. 4, that "[w]here, as here, a regulation is promulgated beyond the scope of the authority of an agency, such regulation does not have the force and effect of law, but rather is a nullity, not only without the Department, but within as well." (Emphasis in original.)

OSMRE responds that the fact it saw the case as a test of its jurisdiction does not mean it brought the enforcement action in bad faith and for the purpose of harassing or embarrassing Alternate Fuels. 43 CFR 4.1294(c) is a national rule promulgated in 1978 by the Secretary to implement the Act, OSMRE argues, and therefore may be challenged only in the U.S. District Court for the District of Columbia in accordance with 30 U.S.C. | 1276(a) (1982). Unless the rule is declared illegal by a Federal court, the Board is bound by it, OSMRE states. In support of its own appeal, OSMRE argues the Board should disapprove Judge Morehouse's finding as to the reasonableness of the amount claimed because it was unnecessary in view of his ruling that appellant's petition must be denied as a matter of law and because whether it was reasonable cannot be determined summarily.

[1] 43 CFR 4.1294 provides:

> Appropriate costs and expenses including attorney's fees may be awarded--
>
> * * * * * * *
>
> (c) To a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee; * * *.

The Interior Board of Surface Mining and Reclamation Appeals held that "[e]specially in a situation * * * in which the final order of the Department resolves a difficult issue and the outcome is close, bad faith must be proved by more than assertions of [the permittee's] personal belief." Dennis R. Patrick, 1 IBSMA 248, 251, 86 I.D. 450, 452 (1979). Prevailing over OSMRE before the Hearings Division is not sufficient to

demonstrate such bad faith. Delta Mining Corp., 3 IBSMA 252, 88 I.D. 742 (1981). Similarly, prevailing over OSMRE in a case that tests the limits of its authority would not, without more, establish that OSMRE issued the enforcement action in bad faith and for the purpose of harassing or embarrassing the permittee.

[2] When 43 CFR 4.1294(c) was promulgated, the following comment was included in the accompanying preamble:

> A number of commenters objected to what they characterized as a double standard for recovery. They argued that all persons should be eligible for an award under the same theory, and that the permittee should not be limited to an award only when bad faith is shown. While it is realized that the standards for an award are not the same for all parties, the legislative history, as set forth above, clearly states that an award may be made to the permittee only when the action is brought or participation is undertaken in bad faith.

43 FR 34376, 34386 (Aug. 3, 1978). The legislative history referred to in this comment "states that attorneys' fees may be awarded 'to the permittee or government when the suit or participation is brought in bad faith.' S. Rep. No. 128, 95th Cong., 1st sess. 59 (1977)." Id. Appellant suggests this language

> makes it clear that the bad faith requirement was to be imposed only when the coal operator or OSM was seeking an award from a private citizen who initiated the proceedings. It does not require or suggest that OSM must act in bad faith as a condition of an award to a permittee.

(Brief at 5).

It is not our province to weigh the merits of these contrasting views of the legislative history of section 525(e). We observe only that while the language of that section does not require a showing of bad faith and improper purpose for a permittee to receive an award from the government for participating in an administrative proceeding, neither does it preclude it. In any event, we do not have jurisdiction to entertain a challenge to the validity of this regulation. Such a challenge must be brought to the U.S. District Court for the District of Columbia. Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111, 116 (1988); Office of Surface Mining Reclamation & Enforcement v. Calvert & Marsh Coal Co., 95 IBLA 182, 190-91 (1987).

Judge Burski's concurring opinion in Donald St. Clair, supra, concerned the regulation governing awards from OSMRE to persons other than permittees, 43 CFR 4.1294(b), not 4.1294(c). The latter regulation was duly promulgated and has the force and effect of law. It is therefore binding on the Board and we are not authorized to declare it invalid. Western Slope Carbon, Inc., 98 IBLA 198, 201 (1987); Robert R. Perry, 87 IBLA 380, 388 (1985).

Administrative Law Judge Morehouse therefore properly denied Alternate Fuels' petition.

[3] Finally, we agree with OSMRE that, having denied the petition,
his finding concerning the reasonableness of the amount claimed was unnecessary. More importantly, his conclusion that the amount was reasonable was not based on the necessary analysis. His decision states that appellant, "in its petition, has set out in detail its time spent, the charges therefor, and expenses incurred," and concludes that he finds them reasonable over OSMRE's general statement that they are not. His finding, however,
is not based on the kind of principles and standards we have indicated are necessary. Council of the Southern Mountains, Inc. v. Office of Surface Mining Reclamation & Enforcement, 3 IBSMA 44, 52-55, 88 I.D. 394, 398-400 (1981); Virginia Citizens for Better Reclamation, 88 IBLA 126, 129-32 (1985). See Dean Trucking Co., 1 IBSMA 105, 86 I.D. 201 (1979). It therefore is appropriate to modify the decision to set aside this finding.

Therefore, in accordance with the authority delegated to the Board
of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge